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No. 89-80

In The

Supreme Court of the United States

October Term, 1989

LEON KATZ, ROBERT A. WRIGHT, JOHN F. RAUHAUSER, JR., WILLIAM E. PFADT, On Their Own Behalf And On Behalf Of All Others Similarly Situated,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

REPLY BRIEF FOR PETITIONERS

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Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) 3

Pa. Const. Art. V, § 16(c) 1

Petitioners submit this reply brief to respond to three points raised in the Respondent, Commonwealth of Pennsylvania's Brief In Opposition to their Petition for a Writ of Certiorari.

• *First*, respondent wrongly implies that the mandatory judicial retirement provisions at issue in this case do not forcibly remove judges from the bench or deprive them of an employment interest.

• *Second*, contrary to respondent's assertion, this Court's decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), does not foreclose this Court's consideration of the proper standard to apply to invidious discrimination based on age.

Moreover, the Court's application of the rational basis standard in the *Cleburne* decision militates in favor of, at least, a remand of this matter to the lower courts.

• *Finally*, respondent improperly and wrongly attempts to divide petitioners' argument under the due process clause into a "substantive due process claim" and a "procedural due process claim," and assert that the latter is not properly before this Court.

1. Senior Judge Status In Pennsylvania Is Not A Matter Of Right

Respondent attempts to mitigate the impact of mandatory judicial retirement by citing Article V, Section 16(c) of the Pennsylvania Constitution which states that a retired judge may "with his consent, be assigned by the Supreme Court on temporary judicial service as may be prescribed by rule of the Supreme Court." Brief in Opposition at 4. Citation of this provision tends to perpetuate

the misleading statement made by the Supreme Court of Pennsylvania below that the mandatory retirement provision "does not preclude the jurists from performing judicial duties after reaching the mandatory retirement age." Pet. A-5 n.4.

Senior judge status in Pennsylvania is not, as in the federal judicial system, an automatic right that simply modifies a judge's workload and compensation structure. As petitioners have pointed out, Pet. at 6, a retired judge's ability to serve is at the sole discretion of the Chief Justice under current Pennsylvania law, and carries significantly reduced compensation on a "per day in court" basis – for a limited number of days and with no compensation authorized for work in chambers. If given the opportunity, petitioners will present evidence that senior judges are used only as needed to handle backlogs on certain especially overburdened state courts. The existence of senior "temporary service" is no substitute for the right to complete one's elected term, and is largely irrelevant to the constitutional issues of equal protection and due process of law raised in the Petition for Certiorari.

2. Dicta In The *Cleburne* Opinion Do Not Foreclose Reconsideration Of The Standard Of Scrutiny For Age Distinctions

In *Cleburne, supra,* the Court held unanimously that requiring a special use permit for a proposed group home for mentally retarded adults violated the equal protection clause because there was no rational justification for the

requirement. In addition, two Justices signed a concurring opinion questioning the labeling of separate levels of scrutiny under the equal protection clause. 473 U.S. at 451 (Stevens, J., joined by Burger, C.J., concurring). Furthermore, three Justices concurred in the judgment while dissenting from that part of the Court's opinion quoted by respondent (Brief in Opposition at 15). 473 U.S. at 455 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

Although the opinion of the Court in *Cleburne* did "quote with approval" the opinion in *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976), the Court's actual holding made consideration of the "suspect class" issue unnecessary. Regardless of whether the Court declined to "set out on [the] course" of extending heightened scrutiny to classifications such as age, 473 U.S. at 446, these *dicta* do not control the instant case in which the issue of age discrimination is properly presented.

In any case, it is surprising that respondent should point to *Cleburne* because the Court's application of the rationality standard in that case supports petitioners' reasons for granting the writ. The Court held that the city of Cleburne's action was not rationally based even though the city identified five justifications for it. 473 U.S. at 447-450. These rationales were at least as compelling as those offered by respondent in this case. *See* Brief in Opposition at 2-3, 12-13.

The rational basis standard does not mean that whatever basis the state offers is rational. Petitioners have demonstrated why, even applying the rationality standard, the Court should reverse the Supreme Court of

Pennsylvania, or at least remand for the creation of a record. *See* Pet. at 15-22, 25-28.

3. Petitioners' Due Process Claim Is Distinct From The Equal Protection Claim And Is Not Divided Into Two Causes Of Action

Respondent is incorrect in asserting that petitioners claim the mandatory retirement provision "deprives them of substantive due process." Brief in Opposition at 17. On the contrary, petitioners have argued at each stage of this case that they, and others similarly situated, are each entitled to the procedural protection of an individual determination of fitness rather than arbitrarily being forced off the bench.

Contrary to respondent's statement, Pennsylvania's judicial retirement scheme does "use age as a proxy for competence." Brief in Opposition at 17. Three of the four rationales for mandatory retirement (Pet. A-12-13) do just that, while the fourth ("corresponds to current trend toward mandatory retirement in other public and private employments") is simply invalid based on judicially noticeable facts. *See* Pet. at 21-22; Brief of Amicus Curiae the Pennsylvania Trial Lawyers' Association at 7.

Through the mandatory retirement scheme the Commonwealth makes an arbitrary decision, based solely on date of birth, that affects the individual's livelihood, reputation and status. Due process requires some fair procedure for making such a decision, beyond merely looking at the calendar. *See* Brief of Amicus Curiae the Pennsylvania Defense Institute at 7-8.

Respondent is incorrect in claiming (Brief in Opposition at 18) that petitioners have presented a new claim in this Court. Petitioners' due process claim, as presented in the courts below and in the Petition for Certiorari, is based on the procedural infirmity of the mandatory retirement scheme.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Certiorari, petitioners respectfully request that the Writ of Certiorari be granted.

Respectfully submitted,

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